MASTIARA SDN BHD

v.

MOTORCYCLE INDUSTRIES (M) SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[CIVIL SUIT NO: 22-29-1982]
11 FEBRUARY 1998

CIVIL PROCEDURE: *Specific performance - Transfer of land - Whether jurisdiction discretionary - Specific Relief Act 1950, s. 21(1)*

LAND LAW: *Charge - Equitable charge - Remedies - Whether National Land Code 1965 applies*

The plaintiff claimed specific performance, further or alternatively damages for breach of contract, or alternatively damages *in lieu* of specific performance, and other reliefs based on a sale & purchase agreement to sell some land with shophouses erected thereon entered into between the plaintiff and the receivers and managers of the first defendant. The receivers and managers were appointed in respect of the first defendant by the debenture holders. The issues to be decided were firstly, whether the receivers and managers had the power to sell the charged land by virtue of the powers conferred upon them by the debenture without taking proceedings under the National Land Code 1965 to obtain a judicial sale, and secondly, whether it was equitable to grant a decree of specific performance to the plaintiff.

Held:

[1] If a charge is registered under the National Land Code 1965 ('the NLC'), ie, if the charge is legal or statutory, the remedy must be in accordance with the NLC. If the charge is an equitable charge the NLC will not apply and a chargee may enforce the remedy provided in the debenture. Otherwise, there would be a *lacuna.* The law recognises equitable charges but no remedy is available.

[2] The jurisdiction to decree specific performance is discretionary. A decree will be made if the circumstances are such that it is equitable to make one.

[Claim dismissed.]

Cases referred to:
Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 ***(dist)***
Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286 ***(foll)***
Malayan Banking Bhd v. Zahari Ahmad [1988] 2 MLJ 135 ***(cit)***
Mama v. Sassoon 55 IA 360 ***(refd)***
Savage v. Uwechia [1961] 1 WLR 455 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 21(1)

For the plaintiff - Mureli Navaratnam (Edward Andrew with him); M/s Ghazi & Lim
For the defendants - Dato' Zaki (Doshi & Roseline Sheila Thomas with him); M/s Abdullah & Zainudin

Reported by Hjh Siti Faridah Abd Jabbar

JUDGMENT

Abdul Hamid Mohamad J:

The plaintiffs' claims in this action are as follows:

(a) Specific Performance of the Written Agreement between the plaintiffs and the first defendants dated 15 June 1979 for the sale by the 1st defendants to the plaintiff of the lands held under Pegangan 536, 537 and 538 respectively in Bandar Jelutong, Section 1, Daerah Timur Laut, Pulau Pinang together with the respective shophouses erected thereon known as Nos. 411A, 411b and 411C, Jalan Jelutong, Penang (hereinafter collectively referred to as "the said properties").

(b) Further or alternatively damages for breach of contract.

(c) Or in the alternative damages *in lieu* of specific performance.

(d) Other reliefs as claimed by the plaintiffs in the statement of claim.

The facts are not in dispute.

On or about 11 July 1978 receivers and managers were appointed in respect of Motorcycle Industries (M) Sdn. Bhd by Yamaha Motor Company Limited, Japan, the debenture holders.

Pursuant to a sale and purchase agreement dated 15 June 1979 ("the first Sales and Purchase Agreement") the Receivers and Managers agreed to sell and the plaintiffs agreed to purchase the said properties for the price of RM510,000.

On 26 May 1979 the plaintiffs paid 10% of the deposit amounting of RM510,000.

On 10 August 1979, the plaintiff paid the balance of the purchase price amounting to RM459,000 (the said sum).

However, the said sum was refunded to the plaintiffs by the receivers and managers on or about 28 September 1979 because the receivers and managers were unable to procure the Directors of Motorcycle Industries (M) Sdn. Bhd to execute the Memorandum of Transfer of the said properties. The plaintiffs refused to accept the refund of the deposit of RM51,000.

In the meantime, the plaintiffs had on 13 January 1982 (2½ years later) filed an application for specific performance of the 1st agreement. The receivers and managers through their solicitors filed an application to strike out the said application on 25 October 1990. That application was dismissed with costs. An appeal against the said decision was dismissed by the Supreme Court with costs on 12 December 1995.

Some seven years later, on 25 November 1986, the receivers and managers obtained a court Order to enable the Receivers and Managers to proceed with the said sale to the plaintiffs and that the receivers and managers were empowered to execute the Memorandum of Transfer ("the said Order").

Pursuant to a letter dated 23 February 1987, the receivers and managers informed the plaintiffs' solicitors regarding the said Order and requested for the payment of the balance purchase price of RM459,000 to complete the transaction.

Vide a letter dated 3 April 1987 the solicitors for the receivers and managers requested the plaintiffs to respond to their letter dated 23 February 1987 within seven days of the receipt of the said letter failing which the receivers and managers would forfeit the deposit and terminate the agreement forthwith.

Since no reply was received from the plaintiffs, on 15 March 1991, ie, three (3) years later the receivers and managers entered into an agreement with one Thum Tak Chin and Leow Beng Guan (the "2nd purchasers") to sell the said properties for a sum or RM550,000.

On 29 January 1992, the receivers and managers obtained a court Order for leave to proceed with the sale of the said properties to the 2nd purchasers and a further order that the Official Receivers be empowered to sign all the relevant documents including the Memorandum of Transfer.

The plaintiffs who came to know of the second sale and purchase agreement proceeded to lodge a caveat and thereafter obtained an injunction on an *ex parte* basis dated 3 November 1992 to prevent the completion of the sale to the second purchasers.

The first issue to be decided is whether the receivers and managers have the power of sale under the debenture.

Clearly cl. 11(c) of the Debenture dated 25 January 1979 empowers the receivers and managers to sell the properties in question. But, the issue arises from the recent decision of the Supreme Court in *Kimlin Housing Development Sdn. Bhd (Appointed Receiver and Manager) (In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors.* [1997] 2 MLJ 805.

I will reproduce the more important part of the head note by way summary of the facts and the decision:

> The borrower company ('the appellant') was the registered proprietor of certain lands ('their lands'). The appellant executed two legal charges ('the charges') under the National Land Code 1965 ('the NLC') over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') to secure banking facilities granted to the appellant. The charges were duly registered unders s. 108 of the Companies Act 1965 ('the Act'). Subsequently, the appellant executed a deed of debenture in favour of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture was duly registered pursuant to s. 108 of the Act. The debenture provided, *inter alia,* for the bank to appoint receivers and managers and for such receivers and managers to have certain powers. Subsequently, events occurred upon which the powers to appoint receivers and managers under the debenture became exercisable. On 13 August, 1987, pursuant to such powers, the bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant ('receivers and managers').
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> Since there was no express provision in the debenture appointing them attorneys of the appellant and being desirous of selling the lands without resorting to proceedings under the NLC to obtain a judicial sale, the receivers and managers applied to the High Court by way of originating summons for leave to sell the lands ('the application'). On 27 February 1989, the appellant went into liquidation and the application by the receivers and managers was opposed by the liquidator ('the liquidator').

The Supreme Court, *inter alia,* held that the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the National Land Code to obtain a judicial sale.

I must say that very clear and learned submission have been forwarded by learned counsel for both sides which makes it easier for me to decide.

Briefly, the submission of the learned counsel for the plaintiff is that *Kimlin's* case does not apply to the instant case because in *Kimlin's* case the charges are legal or statutory charges whereas in this case the charge is an equitable charge.

So, the first question which I have to decide is whether our law recognises equitable charges. It appears to me that this point is settled. All I have to do is to refer to the case of *Mahadevan & Anor v. Manilal & sons (M) Sdn. Bhd* [1984] 1 MLJ 266, a decision of the Federal Court which is binding on this court. In that case, it was held, *inter alia,* that there was no provision in the National Land Code prohibiting the creation of equitable charges or liens. Therefore equitable charges and liens are permissible under our land law. See also *Malayan Banking Berhad v. Zahari bin Ahmad* [1988] 2 MLJ 135 (Mohamed Dzaiddin J).

However, there are certain passages in the judgment in *Kimlin's* case which say that the provisions of the National Land code are exhaustive and exclusive. Those provision cannot be waived nor could the chargor contract himself out of the National Land code. For ease of reference I reproduce the relevant parts of the judgment:

> In our view, therefore, the provisions of the Code as to the rights of chagors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of the debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. With respect, we must therefore hold that the case of *United Malayan Banking Corp. Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* [1986] 1 MLJ 75 – in so far as it decides to the contrary was wrongly decided.
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> In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting our of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy.

What does this mean? Does it mean that all dealings in land or involving land can only be done as provided by the National Land Code and no others? I do not think that that is what the judgment means. I so say because, it is now well – established that "jual janji" and bare trustee concept, to name only two, are recognised by our courts, even though they are clearly not provided by the Code.

Further more, the charges in question in *Kimlin's* case were registered under the National Land Code. Therefore, in my humble opinion, the better view is that, in view of the decision of the Federal Court in *Mahadevan's* case, what is said in *Kimlin's* case should be confined to charges registered under the Code. In other words, if a charge is registered under the Code, the remedy must be in accordance with the Code. If the charge in an equitable charge, outside the Code, the Code does not apply and chargee may enforce the remedy provided in the debenture. Otherwise, there would be a *lacuna.* The law (courts) recognises equitable charges but no remedy is available.

For these reasons, I agree with the submission of learned counsel for the plaintiff, that *Kimlin's* case does not apply to the present case, the charge here being an equitable charge, and therefore the receivers and managers have power, which was given by the debenture, to sell the said properties.

The next question is whether the plaintiff is entitled to specific performance.

Section 21(1) of the Specific Relief Act 1950 provides that "the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so, but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court or appeal".

In *Savage v. Uwechia* [1961] 1 WLR 455 @ 458 Lord Hudson delivery the judgment of the Privy Council, said:

> ... had it been necessary to consider the question of the exercise of discretion to order specific performance they would have required to be satisfied that the circumstances were such that it was equitable to make a decree.

Let us now revert to the facts of this case. There are two periods, actually. The first covers the period from the signing of the sale and purchase agreement on 15 June 1979 until the payment of the balance purchase price on 10 August 1979.

What happened then was that the receivers and managers, even though no doubt they had taken all reasonable meansures, was unable to get the directors of the first defendant company to execute the transfer. At that stage, the plaintiff would be in a stronger position to obtain the decree of specific performance and the court could order either the directors, the receivers and managers to execute the transfer or direct that the Senior Assistant Registrar to do so on their behalf.

But what happened was the plaintiff, on 28 September 1979, wrote to the first defendant's solicitors requesting that the balance purchase price be returned to them immediately, however, without prejudice to their rights under the agreement.

It is clear that the plaintiff wanted to benefit from both sides, having the money and keeping the agreement alive.

However, the receivers and managers do not appear to have given up in their attempts to have the sale completed. Some seven years later they, on their own initiative, obtained a court Order which enabled them to proceed with the sale and getting themselves empowered to execute the memorandum of transfer. The Order was obtained on 25 November 1986.

On 23 February 1987 the receivers and managers informed the plaintiffs' solicitors regarding the said Order and requested for payment of the balance purchase price to complete the transaction.

On 5 March 1987 the plaintiffs' solicitor replied saying that they would revert after taking instructions from their clients.

They did not. Then on 3 April 1987, the solicitors for the receivers and managers of the first defendant requested the plaintiffs to respond within seven days of the receipt of the said letter, failing which they would forfeit the deposit and terminate the agreement.

No reply was received from the plaintiffs for about three years. Then, on 15 March 1991 the receivers and managers entered into and agreement with Thum Tak Chin and Leow Beng Guan (the second purchases) to sell the said properties for RM550,000.

On 29 January 1992, the receivers and managers obtained a court Order for leave to proceed with the sale to the second purchasers and a further order that the Official Receivers (the first defendant Co. had been wound up by then) to sign all relevant documents including the Memorandum of Transfer.

On 3 November 1992, the plaintiffs obtained an injunction on an *ex parte* basis to prevent the sale to the second purchasers.

Until the hearing, ten years after the receivers and managers requested for the balance purchase price to be paid, no payment was made or attempted to be made.

In the circumstance, is it equitable for the court to grant a decree of specific performance? I have no doubt that it is not.

In *Mama v. Sassoon* 55 1A 360 at p. 373, Lord Blanesburgh said:

> In the suit for specific performance he treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part.

ln *Ganam d/o Rajamany v. Somoo s/o Sinniah* [1984] 2 MLJ 290, the Federal Court held that it was not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale, he must also prove that he had performed or had been at all times ready and willing on his part to perform his part of the contract, or his part of the obligations of the contract as fixed or interpreted by the court.

In this case ten years had passed from the date the receivers and managers requested the plaintiffs to pay the balance purchase price, the plaintiffs had not even given any response nor pay the amount. All that the plaintiffs did was to obtain an *ex parte* injunction to prevent the sale to the second purchasers.

If the plaintiffs were all the time ready and willing to complete the sale all they could have done was to pay the balance purchase price which they were asked to pay. At the very least they could have responded to ask for a reasonable time to be fixed to make the payment. They did neither.

In the circumstances, I am of the view that this is not a case in which the court should exercise its discretion to grant a decree of specific performance.

The plaintiffs also claimed "further or alternatively damages for breach of contract".

On the facts of this case I do not think that the first defendant was in breach of the contract. During the first period, the receivers and managers had done all they could to have the Memorandum of Transfer executed but failed. Plaintiffs did not then file this action yet. Instead the plaintiffs requested for

the balance purchase to be returned which was returned. When the receivers and managers finally were in a position to complete the transaction and requested the plaintiffs to pay the balance purchase price, there was no response from the plaintiffs until now. The defendant had made it very clear in their letter dated 3 April 1987 that they would forfeit the deposit and terminate the agreement if they did not receive a reply. No reply come from the plaintiffs either within the stipulated time or at any time thereafter. In the circumstances, it would not be correct to say that the defendant had breached the contract.

The plaintiffs also claimed "in the alternative damages for breach of contract."

This remedy is applicable where a plaintiff having succeed in his case, but for some reason, for example where the land is already registered in the name of *bona fide* purchaser and is therefore unable to be transferred to the plaintiff, in such a case the court may order that damages be paid in lien of specific performance. That is not the case here. The plaintiffs fail in their claim because they have failed to perform their part of the contract. Therefore the question of damages *in lieu* of specific performance does not arise.

Prayer (iv), lien on the said properties, is a non issue in view of my judgment on the other prayers.

Lastly, concerning the deposit. The plaintiff did claim for the refund of the deposit in case their claim fail. Further, as I have mentioned, the defendant had made it very clear in their solicitors letter dated 3 April 1987 that they would forfeit the deposit if they received no reply from the plaintiff. In the circumstances I think that the defendant is entitled to forfeit the deposit. On these grounds I dismissed the plaintiffs' claims with costs.